STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-20-181

AVANGRID NETWORKS, INC.
Plaintiff/Appellant

INDUSTRIAL ENERGY CONSUMER GROUP and MAINE STATE CHAMBER OF COMMERCE
Plaintiff-Intervenors/Appellants

v.

MATTHEW DUNLAP, in his official capacity as Secretary of State for the State of Maine
Defendant/Appellee/Cross-Appellant

MAINERS FOR LOCAL POWER and NINE MAINE VOTERS
Defendant-Intervenors/Appellees/Cross-Appellants

NEXTERA ENERGY RESOURCES, LLC
Defendant-Intervenor/Appellee

On Appeal from Cumberland County Superior Court
Docket No. 20-206

REPLY AND CROSS-APPEAL RESPONSE BRIEF OF APPELLANT INDUSTRIAL ENERGY CONSUMER GROUP

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ARGUMENT

This appeal does not require the Court to issue a definitive pronouncement on the outer boundaries of legislative power. Nor does it demand that the Court announce a general rule for when pre-election review of what purports to be a citizen initiative is warranted. For wherever the precise limits of legislative power lie, a measure that simply commands an executive agency to reverse a final decision it lawfully made unmistakably crosses the line. Because that is clear on the face of the Initiative, the Court should decide the constitutional question now and order that the Initiative not appear on the November ballot.

The reason there is no Maine precedent directly on point is straightforward: no abuse of the initiative power this brazen has previously been attempted. As the Brief of Former Commissioners of the Maine Public Utilities Commission explains, the Initiative "would require the Commission to ignore its own findings of fact in the case—upheld as supported by sufficient evidence in the record by this Court—and substitute a different set of findings not found in or supported by the record, but rather dictated by a political initiative . . . ." *Id*. at 16. The effect of this would be to "erode, not just the trust the Commission has enjoyed from its inception, but the integrity of the adjudicatory process itself." *Id*. at 20.

The effect of this Court not declaring the Initiative unlawful and unconstitutional *now* would be to put a powerful weapon of delay in the arsenal of opponents of energy infrastructure projects in Maine, a weapon that would be capable of stalling projects for a year or more[1] even when the actual measure being advanced is improper and violates the separation of powers on its face. The separation of powers was crafted to ensure the certainty, predictability, and finality of government action, and the Court should decline the invitation to enforce it with a laxity that would, for extended periods of time, produce just the opposite result.

Because the constitutional issues have at this point been comprehensively briefed, IECG limits itself here to responding to the Secretary's extraordinary proposal that the Court declare the Initiative unconstitutional, but let the election go forward anyway, and to explaining

[1] A proposed initiative must be approved by the Secretary of State, petitions must be printed, and tens of thousands of verified registered voter signatures must be collected and submitted within the first 50 days of the start of the Legislature's first regular session (which convenes in December) or within 25 days of the start of the second regular session (which convenes in January). (Me. Const. art. IV, pt. 3, § 18.) An initiative does not appear on the ballot until the general election in November. *Id*. Close to a year therefore elapses between the formal start of an initiative campaign and the ensuing vote—and then, if the initiative passes, still more time will pass while the legality of the measure is being litigated.

why the cases and statutes Mainers for Local Power ("MLP") cite on the powers of the PUC do not advance its cause.

I. The Secretary's constitutional analysis is correct, but his proposed remedy makes no sense.

IECG supports Avangrid in arguing that the people of Maine do not have the power to reverse by citizen initiative a specific decision of the PUC that has been upheld on appeal by this Court, or to direct the PUC to make the new, contrary findings prescribed by the Initiative. The Secretary agrees. *See* Sec'y Br. at 23 ("[T]his case presents the extraordinary circumstance in which an initiative involves a subject matter that is beyond the power of the voters to enact."); *see also id.* at 20-21 ("The Legislature may amend statutes in response to a particular administrative or court decision with which the legislative body disagrees, and it may apply those amendments retroactively—but not to the extent of reopening matters that have become final judgments."). In the Secretary's correct view, "the people's power is strictly legislative and neither the citizens nor the Legislature has the authority to reverse a permit granted by an agency after an adjudicatory hearing and upheld by this Court on appeal." *Id.* at 9. The Secretary also agrees with Avangrid and IECG that the issue is ripe for pre-election review. *Id.* at 14 ("The Secretary believes that whether the fundamental and

overriding purpose of this Initiative places it beyond the electorate's power to enact is an issue that is ripe for judicial review at this stage.").

The Secretary's otherwise sound analysis concludes, however, with a dramatic misstep. In the Secretary's view, although the question is ripe for decision, and the Initiative exceeds the people's power, the unconstitutional Initiative should remain on the ballot, because (according to the Secretary) Avangrid is not entitled to injunctive relief. *Id*. at 24. On this point the Secretary errs.

One factor is conspicuously absent from the Secretary's analysis of the appropriateness of injunctive relief: Avangrid's likelihood of success on the merits. *See Ingraham v. Univ. of Maine at Orono,* 441 A.2d 691, 693 (Me. 1982) (one of the four factors courts weigh in deciding on injunctive relief is whether the "plaintiff has exhibited a likelihood of success on the merits" of their claim). This Court has also said that "greater certainty of victory should result in a less stringent requirement of proof of irreparable injury." *Dep't of Envtl. Prot. v. Emerson,* 563 A.2d 762, 768 (Me. 1989) (quotation marks omitted). The likelihood of success factor, which the Secretary omits from his analysis, weighs decisively in favor of injunctive relief here.

Instead, the Secretary ignores the most important of the *Ingraham* factors, inexplicably arguing that there is no need for the Court to issue an

injunction because a vote on the Initiative would be a meaningless and inconsequential exercise:

> If the Court determines that the citizens lack the power to legislate in the manner presented by this Initiative, that would alter the practical and legal effect of any vote on the Initiative, thereby eliminating any potential harm to Avangrid from the election.

(Sec'y Br. at 26.) The Secretary's position, in other words, is that the Initiative should first be declared unconstitutional, but then be put to the voters all the same, because it will have no actual effect. Holding a vote on an unconstitutional initiative that would not become law, no matter the outcome, is not something Maine law permits; for the Secretary to do so would be an *ultra vires* act that violates the separation of powers.

Our system of government demands that the people give respectful consideration to matters that are put to a vote; they deserve respect in return. Proper respect for the people means not asking them to vote on a question they have no power to decide. "The voters, having been apparently assured" by the presence of a question on the ballot "that the measure would be effective if approved, would not unreasonably feel betrayed when the court later entertained a new challenge which proved successful." *Citizens for Responsible Behavior v. Superior Court,* 1 Cal. App. 4th 1013, 1023 n. 5 (1991). "[D]eferring a decision until after the election . . . may contribute to an

increasing cynicism on the part of the electorate with respect to the efficacy of the initiative process." *Senate of State of Cal. v. Jones,* 21 Cal. 4th 1142, 1154 (1999); *see also Schultz v. City of Philadelphia,* 385 Pa. 79, 86, 122 A.2d 279, 283 (1956) ("[I]t would seem to us to be wholly unjustified to allow the voters to give their time, thought and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter . . . confront them with a judicial decree that their action was in vain . . . .").

Having the people vote on a measure that *could* prove to be beyond their power to achieve is bad enough. Holding a vote on a measure that has in fact been declared to be unconstitutional would be even worse. It would irreparably harm the voters—many of whom would be confused and distracted from their actual voting duties by the pointless exercise the Secretary proposes—and the reputation of democracy itself.

The Secretary appears to sense the danger of undermining the legitimacy of the democratic process, but suggests that the solution is "a judicial decision that an initiated measure is invalid" before the vote has taken place. (Sec'y Br. at 28 n. 14.) It would be even more corrosive of democracy, however, to stage what would in essence be a sham election, in which a question is put to the voters that the Court has already ruled they do not have the power to decide. The Secretary's conclusory assertion that by declaring

the Initiative unconstitutional, but then letting the people vote on it anyway, the Court could somehow "avoid causing this harm" (*id.*) does nothing to address what the Secretary acknowledges is a real problem.

Rather than offer an affirmative justification for his proposal that an election should be held on an unconstitutional initiative, the Secretary suggests that not putting the Initiative on the ballot "would frustrate over 66,000 Maine citizens who validly signed the petition," and others who support or oppose it, and "would undermine the public's confidence in the initiative process." (Sec'y Br. at 27-28.) That justification is outweighed by the reasons for enjoining the vote. If there is frustration, it should be directed at the people who drafted an initiative that is unable to withstand constitutional scrutiny—not at the initiative process itself.

It is of course true that "[t]he broad purpose of the direct initiative is the encouragement of participatory democracy . . . ." (Sec'y Br. at 27 (quotation marks omitted)); *see also* MLP Br. at 1 ("This case is about the right of citizens to engage in participatory democracy."). But the election the Secretary proposes—one where nothing rides on the outcome, and it makes no difference how anyone votes—would not be an exercise in participatory democracy in any recognizable sense. It isn't participatory democracy when the votes don't count. Enforcing the boundaries of the initiative power is not

anti-democratic, because voting on a non-legislative initiative is not an exercise of the powers reserved to the people.

MLP argues that the constitutional question this case presents should not be decided until after the election because "[e]ven if the Initiative were later invalidated, the people's vote might motivate the PUC to reconsider its decision or cause the Legislature to adopt different legislation to block the CMP Corridor." (MLP Br. at 11.) An election, however, is not an opinion survey or focus group; it is a mechanism for deciding how the state is to be governed. There is no provision in Maine law for an election to be used for the purpose of providing an advisory opinion of the voters. *See In re Initiative Petition No. 349, State Question No. 642,* 1992 OK 122, 838 P.2d 1, 12 (ordering that an unconstitutional initiative not appear on the ballot because, "at best, it would serve as an expensive, non-binding public opinion poll," and "[w]ere we to allow the initiative to be submitted to the people, a costly, fruitless, and useless election would take place."). Even if there were such a provision in Maine law, holding a vote on the Initiative after it has been declared unconstitutional would be a poor way of measuring public opinion on the NECEC project, given the unknowable impact a pre-election constitutional ruling would have on how voters view the Initiative and on voter turnout

(voters on one side or the other could become more or less inclined to vote upon learning that their votes would have no legal effect).

In arguing that a vote on the unconstitutional Initiative could influence the PUC or the Legislature, MLP concedes that the vote could cause real harm to the future of Maine's economy and climate. At a time when perceived threats to the democratic system—such voter suppression, gerrymandering, and splits between the electoral college and the popular vote—are afoot in the land, Maine's electoral machinery should not be tinkered with, to unknown effect, by having citizens cast what would amount to fake votes.

If MLP wishes to influence the PUC or the Legislature, it is free to use lawful techniques for doing so—as the project's opponents did during the PUC process, including an unsuccessful appeal to this Court. But the tools of democracy should not be commandeered to have the voters issue a non-binding advisory opinion. That is not what elections are for, and there is nothing "antidemocratic" (MLP Br. at 11) about declining to use them that way. Because Maine law does not provide for elections to be held on measures that are beyond the people's power to legislate, the Secretary should be enjoined from putting the Initiative on the ballot. The Court need go no further to order the removal of the Initiative from the ballot.

The *Ingraham* factors point to the same conclusion. 441 A.2d at 693. The Secretary has agreed that Avangrid should prevail on the merits. *Id.* Avangrid, IECG's members—and, most importantly, the legitimacy of the democratic process—would suffer irreparable injury if a vote were taken on an unconstitutional initiative the Secretary acknowledges the people have no power to enact. *Id.* That outweighs any harm an injunction would inflict on anyone, as there is no legitimate basis for putting a question to the voters that the Secretary admits they cannot answer with any legal effect. *Id.* And the public interest does not support the unorthodox procedure the Secretary has proposed. *Id.* The initiative mechanism should not be used for an unauthorized and improper purpose, and a "costly, fruitless, and useless election" should not be held. *In re Initiative Petition,* 838 P.2d at 12.

II. The cases and statutes MLP cites on the powers of the PUC do not advance its cause.

MLP argues that because the power to regulate public utilities originated with the Legislature, "the Legislature may overrule actions by the PUC," because it "exercises delegated legislative authority." (MLP Br. at 23.) But the case it relies on does not support the proposition that the Legislature may step in—after the PUC has issued a permit, and its decision has been affirmed by this Court—and order the opposite outcome.

In *Auburn Water Dist. v. Public Utilities Commission,* 163 A.2d 743 (Me. 1960), the Legislature did not undo an action the PUC had already taken in the exercise of the power delegated to it, as the Initiative would do here. Instead, the Legislature itself had in 1923 created the Auburn Water District by a legislative charter that prescribed that, in the future, after the district came into existence, the annual charge for water service to the City of Auburn would be $3,000. Decades later the PUC sought to disregard the rate the Legislature had established in the legislative charter, and to instead set rates based on its view of what would be just and reasonable. The question before the Court was "whether the Commission is bound to accept the charge or rate" the Legislature had lawfully established in 1923. *Id.* at 744.

The Court held that it was. "The Legislature may limit the power of its agent, the Commission, if it so pleases," and therefore the PUC "must accept the city water rate fixed by the Legislature . . . ."[2] *Id.* at 745-46. In other words,

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[2] MLP seizes on the Court's characterization of the PUC as the Legislature's "agent" (*see* MLP Br. at 24)—but a basic principle of agency law is that when an agent acts within its authority on behalf of its principal, the principal is bound by the agent's action. *See Motorsport Eng'g, Inc. v. Maserati SPA*, 316 F.3d 26, 29–30 (1st Cir. 2002) ("An agent is . . . someone who is authorized by the principal to act on the principal's behalf and bind the principal as if the latter were there himself."); *Burnham v. Ellis*, 39 Me. 319, 320 (1855) ("The contracts of an agent within the limits of his authority, and his declarations while in the transaction of business confided to his charge, are as binding on his principal as if made by him.")

if the Legislature sets a rate in the first instance, the PUC is bound by that rate going forward. *Auburn Water* stands for the simple proposition that the PUC must follow the law when it acts. That is what happened here: the PUC acted under authority delegated by the Legislature, and this Court upheld its action. The Initiative now seeks to overturn the PUC's lawful action. *Auburn Water* holds that the Legislature may set a rate prospectively in a charter, and in so doing bind the PUC to adhere to that rate; it does not hold that the Legislature may insert itself into a specific adjudicatory proceeding *after* the PUC has issued a final decision that has been upheld on appeal and order the opposite outcome.

Also unhelpful to MLP's cause is 35-A M.R.S. § 1323, which it describes as allowing "an applicant, *unsuccessful* before the PUC, to petition the Legislature directly for the relief that the PUC denied." (MLP Br. at 25 (emphasis added)); *see* 35-A M.R.S. § 1323 ("In applying to the Legislature, the utility shall state in writing that it has applied to the commission . . . and that the commission has denied its application."). Section 1323 serves to protect the Legislature from petitions by unsuccessful applicants who did not first exhaust the regulatory process the Legislature established. Here, however, the PUC granted the permit. A statute that bars an applicant—by definition a public utility—from applying to the Legislature unless it first exhausts its

rights before the PUC cannot fairly be read to say that opponents of a permit the PUC has issued may use the legislative machinery of the state to overturn it. The thrust of 35-A M.R.S. § 1323 is simply that regulated utilities, which had previously been regulated directly by the Legislature, after 1913 were required to accede to PUC regulation, yet retained their constitutional right to petition the Legislature to change existing standards governing their operation prospectively. The import of the statute is to reinforce the primacy of the PUC process, not to justify undermining that process after the fact.

As for the Aqua Ventus bill (Resolves 2019, ch. 85 ("LD-994")), incorrectly characterized by MLP as an instance where "the Legislature directly overruled the PUC's decision to reconsider the grant of an offshore energy-supply contract to a particular company . . . and order[ed] the PUC to approve the contract as originally proposed" (MLP Br. at 26), the PUC had decided to approve a term sheet to be reduced to a commercial contract, but then solicited public comment on whether to reconsider its decision and reopen the request for proposals. *See* LD-994 (whereas clauses). Although the PUC voted to reopen the proceeding in order to reconsider its decision, it never actually reconsidered. Instead, the case remained open until the Legislature stepped into what was then a pending (non-final) proceeding and directed the PUC to approve a commercial contract based on the term sheet

the PUC had previously approved, with modifications based on passage of time. That is not at all like what the Initiative purports to do here. LD-994 directed the PUC on how to act prospectively in a still pending matter by instructing the PUC to finally implement its own earlier decision. What the Legislature may *not* do is direct the PUC to reverse a final decision that has been upheld on appeal by this Court.[3]

Also unhelpful to MLP is 35-A M.R.S. § 1321, which provides that the PUC "may at any time rescind, alter or amend any order it has made"—but "only if it gives the public utility or competitive service provider and all parties to the original proceeding, to the extent practical, written notice and after opportunity for those parties to present evidence or argument, as determined appropriate by the commission." That did not happen here. Section 1321, like Section 1323, is based on the principle that regulatory decisions are to be made by the PUC, with due process, based on the facts and the law.

While MLP is correct that "[b]allot initiatives in Maine have previously been used to approve or disallow particular projects" (MLP Br. at 23 n. 11),

[3] It also bears noting that LD-994 was not subject to a challenge, and thus no court considered whether it exceeded the legislative power.

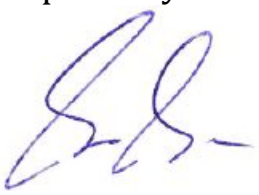
the examples it cites have no bearing on the constitutionality of the Initiative. Acquiring land to create a nature preserve is obviously something the Legislature has the power to do; the initiative MLP cites did not issue or revoke a permit. Prospectively amending the state's gambling laws is also nothing like directing the PUC to change a final order it previously issued (granting a permit) by discarding its findings and replacing them with new, contrary findings (denying the permit). Nor does legislation "[d]eciding the future of the Maine Yankee nuclear power plant" bear any resemblance to the Initiative, as the Legislation in that instance achieved its objective, not by revoking a permit, but with the indisputably legislative mechanism of prospectively banning the creation of radioactive waste at all nuclear power plants in Maine.

CONCLUSION

Because it is clear on its face that it is unlawful and violates the separation of powers, the Initiative should not appear on the November ballot.

Dated at Portland, Maine this 20th day of July, 2020.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, Attorney for Industrial Energy Consumer Group, certify that I have, this date, served by email (by agreement of counsel) the Reply and Cross-Appeal Response Brief of Appellant Industrial Energy Consumer Group to the attorneys listed below.

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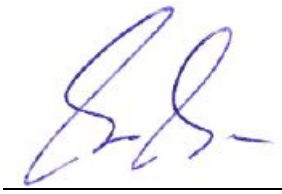

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